

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL AFFIDAVIT OF MAILING

77-1296

To be argued by
ELIA WEINBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1296

UNITED STATES OF AMERICA,

—against—

**ALPHONSE BIFULCO, MICHAEL
THISTLETHWAITE, and JOHN McFARLAND,**
Appellants.

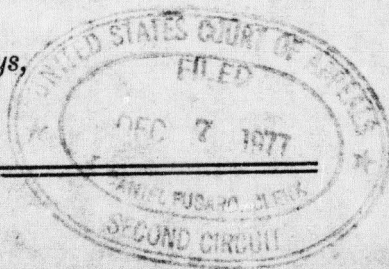
Appellee,

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

BRIEF FOR THE APPELLEE

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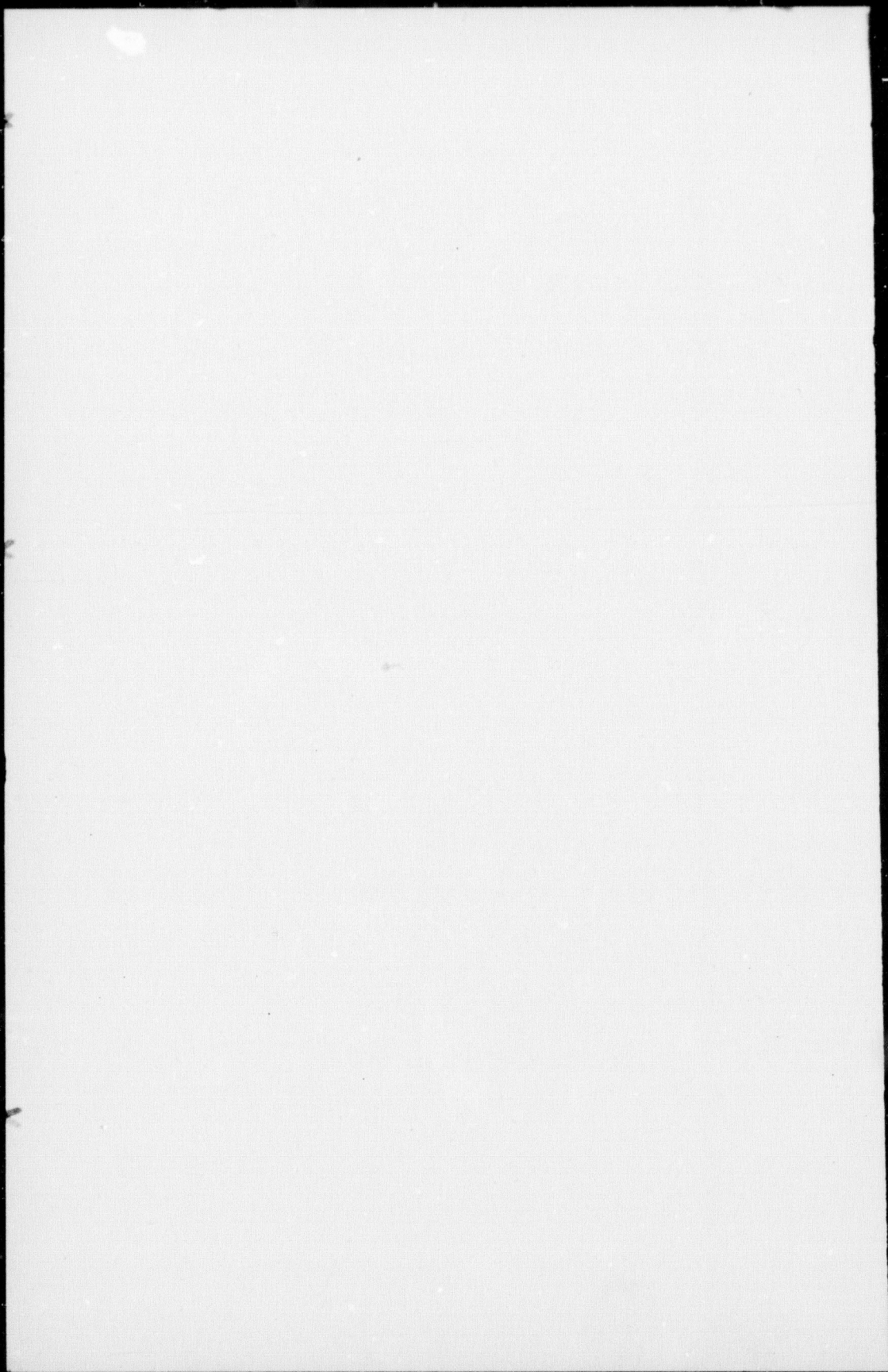


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and JOHN MCFARLAND,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Alphonse Bifulco, Michael Thistlethwaite, and John McFarland appeal from judgments of the United States District Court for the Eastern District of New York (Costantino, *J.*) entered on June 3, 1977, as to Bifulco and McFarland, and on September 20, 1977, as to Thistlethwaite. Appellants were convicted, following a jury trial, on a one-count indictment charging them with conspiring, between June 1975 and December 30, 1976, to manufacture, distribute, and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance. (Title 21, United States Code, Section 846).¹

¹ A fourth named defendant and conspirator, Mario Bifulco, was acquitted by the jury. In addition, the indictment charged a fifth defendant, Roseann Polimeni, with participating in the same

[Footnote continued on following page]

Alphonse Bifulco was sentenced to four years' imprisonment and a special parole term of five years. In addition, he was fined \$1000. Michael Thistlethwaite was initially sent for study and report pursuant to Title 18, United States Code, Section 5010(e), and was subsequently sentenced under the Federal Youth Corrections Act, Title 18, United States Code, Section 5010(b). John McFarland was sentenced to four years' imprisonment and a special parole term of ten years. In addition, he was fined \$2500. Each appellant is now incarcerated.

Appellants Bifulco and McFarland allege on appeal that the proof adduced at trial established multiple conspiracies rather than the single conspiracy charged in the indictment. Each alleges that the District Court improperly charged the jury on the law of conspiracy. In addition, Bifulco challenges the sufficiency of the evidence against him. Appellant Thistlethwaite assigns as error two rulings of the District Court. The first ruling, made after a suppression hearing, permitted the admission in evidence of his post-arrest statements. The second ruling, made during the course of the trial, refused the declaration of a mistrial when Larry DeMaio, a Government witness, testified that a defendant in an unrelated phencyclidine case had been sentenced to five years' probation and a fine of \$2000.

conspiracy. Prior to trial, Miss Polimeni pleaded guilty to the charge. She testified during the course of the trial for the Government and was sentenced on June 7, 1977, to three years' imprisonment and five years' probation. Execution of the prison sentence was suspended.

In addition to the five named defendants, the indictment listed the following individuals as co-conspirators but not as defendants: Larry DeMaio, Robert Borsillino, John Kowalchik, and Steven Kopf. Of these individuals, Larry DeMaio testified at trial for the Government.

Statement of Facts

A. The Government's Case

1. Introduction and Summary

The Government presented its case principally through the testimony of two individuals, Lawrence DeMaio (an unindicted co-conspirator) and Roseann Polimeni (an indicted co-conspirator), who were both intimately involved, between approximately June 1975 and December 30, 1976, in a conspiracy to manufacture and distribute phencyclidine (PCP or "angel dust", as it will hereinafter be referred). Angel dust, as the testimony showed, is a hallucinogenic drug whose chief commercial use is as an animal tranquilizer (638).² Unlike the drugs involved in a great many drug conspiracies, angel dust is capable of being made relatively easily by someone familiar with chemistry and laboratory techniques (1444). The chemical ingredients used to make angel dust can be bought legally (1315), and so it is not difficult for one person or a group to vertically integrate an angel dust operation: that is, to buy the chemicals (or "precursors"), make the angel dust, and sell it.

The evidence showed that two individuals, appellants Michael Thistlethwaite and John McFarland, were interested in just such an operation in the late summer of 1975. They approached Lawrence DeMaio, who lived in their neighborhood, the Richmond Hill area of Queens, and who was well qualified by experience and training to make angel dust (380, 386-87). DeMaio allied himself with Thistlethwaite and McFarland for a few months, and, during that time, various chemical precursors were purchased at local chemical supply houses. The three men

² Numerical references are to pages of the trial transcript.

attempted and eventually succeeded in producing angel dust for sale and consumption (407). Soon afterwards, however, DeMaio ceased production of angel dust for Thistlethwaite and McFarland because of rumors that federal narcotics agents were interested in his activities (413).

Undaunted by DeMaio's departure, Thistlethwaite and McFarland continued to purchase precursors of angel dust and continued their plan to manufacture and distribute it. To further their plans they combined their operation with appellant Alphonse Bifulco and his brother Mario in November 1975.

The agreement among Thistlethwaite, McFarland, and the Bifulco brothers was shown through the testimony of both Lawrence DeMaio and Roseann Polimeni. The former testified that after he had ceased making angel dust for Thistlethwaite and McFarland, Thistlethwaite informed him that he had allied himself with the Bifulcos and asked for DeMaio's help, as an expert, in inspecting a batch of angel dust then being made by Thistlethwaite at the Bifulcos' apartment (414, 420). DeMaio acceded to this request.

Roseann Polimeni testified that she and Alphonse Bifulco were engaged strictly in the business of selling angel dust while they were living together in the late summer and early autumn of 1975. They, too, were interested in vertically integrating their operations, that is, in manufacturing angel dust rather than simply buying it at wholesale and selling at retail. Alphonse and Roseann knew Thistlethwaite and McFarland; they lived in the same neighborhood and frequented the same places; and, indeed, Alphonse Bifulco, Roseann Polimeni, and Michael Thistlethwaite were arrested together in September 1, 1975, and a quantity of angel dust was found by police officers in Alphonse Bifulco's jacket pocket (1271, 1277).

Roseann Polimeni testified that after breaking up with Alphonse Bifulco, she lived with Michael Thistlethwaite and saw chemicals and angel dust in his apartment. She accompanied Thistlethwaite and McFarland to purchase chemicals and overheard their plans to make large amounts of money through their efforts. Most importantly, she learned of Thistlethwaite's and McFarland's alliance with the Bifulcos at approximately the same time as did Lawrence DeMaio. She testified in detail, and corroborated DeMaio, that Thistlethwaite and McFarland were linked to the Bifulcos in the plan to make and sell angel dust (881-89). Miss Polimeni further stated that she was familiar with all of the appellants, having lived with two of them, Alphonse Bifulco and Michael Thistlethwaite, and having also shared her sexual favors with McFarland, Mario Bifulco and a number of other men (1200, 1225).

In addition to the testimony of Larry DeMaio and Roseann Polimeni, evidence of the conspiracy was corroborated both by additional testimony and documentary exhibits. Thus, the evidence showed, for example, that each of the appellants had purchased large amounts of chemical precursors (1486, 1500); that Michael Thistlethwaite and John McFarland had used false names³ to make such purchases; that Michael Thistlethwaite was using either (a precursor) in his apartment (1324); that John McFarland was arrested in his apartment on July 23, 1976, and found in possession of nine ounces of angel dust (1328-36); that appellants McFarland and Alphonse Bifulco each had the other's phone number handwritten in their telephone books (1369, 1403); and, finally, that each of the appellants made post-arrest statements which reasonably could have led the jury to believe that each was involved in the angel dust business (1400-13).

³ The indictment in fact charged John McFarland, "also known as John Kaine," and Michael Thistlethwaite, "also known as Mike Thistle." See p. 18 *infra*.

2. Lawrence DeMaio's Participation in The Conspiracy

a. DeMaio's background as a chemist and drug seller

Lawrence DeMaio testified that in 1970, while he was in college and experimenting with a wide range of drugs,⁴ he became familiar with angel dust (384-385). At first, this familiarity was limited to smoking the drug, which would be mixed with parsley or mint flakes (389). In 1973, DeMaio, who had majored in chemistry in college, began making angel dust with friends, at first in ounce and subsequently in pound quantities, in various locations, including schools, houses, yards, and cemeteries (380, 386-387).⁵ The chemicals used to make angel dust were purchased at several chemical supply houses in the greater New York area (397). After the angel dust was made, DeMaio would smoke some and sell the rest to friends. Sales were made in quarter and half pound quantities. In turn, the angel dust sold by DeMaio to friends would be sold to other people in "nickel" bags, that is, for five dollars a bag (388, 389, 469). Originally, DeMaio would sell a pound of angel dust for \$500, but the wholesale price of one pound increased to \$1200. One pound of angel dust could yield 640 "nickel" bags, so that the ultimate retail value of one pound of angel dust was \$3200 (389). DeMaio estimated that from

⁴ DeMaio admitted using LSD (458), marijuana, "ups and downs", and mescaline (460).

⁵ DeMaio explained that the use of yards, parks, and cemeteries was mandated by the odor and flammability of one of the ingredients, ethyl ether (390, 1444).

1973 through 1975, he sold fifteen to twenty pounds of angel dust, and made \$15,000 to \$20,000 (564).^e

b. DeMaio's agreement to manufacture angel dust for McFarland and Thistlethwaite: Summer 1975

In August 1975, DeMaio was introduced to John McFarland^f and Mike Thistlethwaite in a park in Middle Village, Queens, close to where he then lived (391, 392). DeMaio had once met McFarland before in the summer of 1973 at a party where DeMaio was smoking "pot" and angel dust (394). In the park, McFarland and Thistlethwaite offered DeMaio \$400 for each pound of angel dust that he could make. The plans called for the manufacture of ten pounds of angel dust a week, and McFarland promised to supply the chemicals and a place to make the angel dust (394, 395). About one week after this initial conversation, McFarland, Thistlethwaite, and McFarland's girlfriend met with DeMaio again in the park (396). McFarland told DeMaio that everything was proceeding smoothly, but he did not yet have the chemicals (396). At this point, Thistlethwaite advised DeMaio that he would be working with DeMaio in the production of angel dust (397).

On a subsequent occasion, DeMaio went to McFarland's apartment and met McFarland, Thistlethwaite

^e DeMaio described in great detail the steps involved in making angel dust, which involves combining four chemicals, cyclohexanone, sodium cyanide, sodium bisulfate, and piperidine, to produce a crystal. The crystal is then combined with a grignard, formed from bromobenzene, magnesium turnings, and ethyl ether, which produces angel dust crystals that are poured on mint flakes or parsley and then smoked (390).

^f DeMaio identified the defendant John McFarland as the man he knew as Jack McFarland (392).

and McFarland's girlfriend. McFarland and Thistlethwaite showed various chemicals to DeMaio, including piperidine, cyclohexanone, bromobenzene, and magnesium turnings (398, 399). The chemicals were stored in bottles and DeMaio saw chemical beakers in the apartment (399, 400).

During the following weeks, DeMaio went to McFarland's apartment on a daily basis and talked with McFarland and Thistlethwaite about the manufacture of angel dust and the money they would make (402). During the same period, DeMaio, Thistlethwaite, and McFarland went to Consol-Lab in Garden City, Long Island, to buy the ingredients needed to make angel dust (449-450). See p. 18, *infra*. At the end of September 1975, McFarland, DeMaio, and Thistlethwaite drove to Harriman State Park and tried to make grignard, one of the intermediate stages in the process of making angel dust (403). The three spent almost one day in the park, but in the end they did not succeed in making the grignard (403). They returned to the city, and approximately one week later, DeMaio met McFarland and Thistlethwaite and told them about another location in upstate New York where they could make grignard without being detected (404). On the next day, the three went to Sprout Lake, and again tried and failed to make grignard (405). Eventually, however, after discussing their problems, they succeeded in making grignard in the laundry room of Thistlethwaite's apartment building (406). About two weeks later, Thistlethwaite, McFarland, and DeMaio succeeded in making more grignard in McFarland's apartment (407). On the following day, the three succeeded in mixing the grignard with crystals to make angel dust (408). McFarland

later told DeMaio that the angel dust was sold for \$800 per pound, and he paid DeMaio \$250 for his work (409).⁸

A short time later, in November 1975, DeMaio met with McFarland and told him that Drug Enforcement Administration (D.E.A.) agents were questioning a friend about his (DeMaio's) involvement with angel dust. DeMaio told McFarland that because of this development he was not going to make angel dust with McFarland and Thistlethwaite, but he promised to give them the chemicals that he had in his apartment (413). On a later date, McFarland and Thistlethwaite came to DeMaio's apartment to get the chemicals.

c. DeMaio's involvement with Thistlethwaite, McFarland, and the Bifulco brothers: November-December 1975

Although DeMaio decided not to make angel dust with McFarland and Thistlethwaite, in late November 1975 he met Thistlethwaite, who told him that he had met two people, Mario and Alphonse Bifulco, with whom he was planning to make angel dust (414, 418).⁹ About one week later, Thistlethwaite called DeMaio and told him that he had made crystals for Mario and Alphonse Bifulco, but that things were not proceeding properly, and he asked DeMaio to inspect the process (416).

Thistlethwaite drove with DeMaio to an apartment in Queens where he was introduced by Thistlethwaite to Mario and Alphonse Bifulco (418). Thistlethwaite told

⁸ DeMaio and Thistlethwaite were not satisfied with the small returns for their efforts and talked to each other about going into business without McFarland (411). Thistlethwaite had worked alongside DeMaio when the latter mixed the grignard with the crystals (409) and Thistlethwaite claimed he knew the formula to make angel dust (411).

⁹ DeMaio, who had gone to Thistlethwaite's to get "high", got angel dust from Thistlethwaite (416).

the Bifulco brothers that DeMaio was brought over to check the crystals (420). DeMaio saw the chemicals and equipment in the apartment, and after examining the results, he told Thistlethwaite that the angel dust crystals would not form and that the batch might as well be discarded (420). At this point, Mario Bifulco became angry at Thistlethwaite, and told both DeMaio and Thistlethwaite that they would not leave the apartment until some angel dust was made (425). DeMaio became frightened (427). Eventually, Thistlethwaite and DeMaio "talked" their way out of the apartment, and entered Thistlethwaite's car. As they were about to drive off, one of the Bifulco brothers pulled up in a car and cut off their exit (440, 441). There was in fact a high speed car chase through Queens, but Thistlethwaite and DeMaio succeeded in maneuvering their way home (443).

A week later, DeMaio went to Thistlethwaite's apartment. As he walked past the vestibule of the apartment, he saw Mario Bifulco, McFarland, and Thistlethwaite (443). DeMaio walked around the block and was met by McFarland, who told him that Mario Bifulco and a man named "John" were there and that DeMaio "should get out of there" (444). DeMaio retreated to his car, waited until Bifulco left, and then met with Thistlethwaite and asked him what had occurred (444).

Thistlethwaite explained that he was trying to get out of the agreement that he had made with Alphonse and Mario Bifulco, but that they were opposed and had in fact threatened him (444). Shortly afterwards, DeMaio met with Thistlethwaite again and was told that the Bifulcos wanted five pounds of angel dust and \$2000 from Thistlethwaite (446). According to Thistlethwaite, the Bifulcos had also threatened his grandmother's life (446). When DeMaio was informed of the Bifulcos' demands, he told Thistlethwaite that he did not want to get involved (446). While he was at Thistlethwaite's apart-

ment, DeMaio spoke by telephone with Thistlethwaite's grandmother, and as a result of the conversation, DeMaio told Thistlethwaite that he would help him make angel dust so that Thistlethwaite could "pay off" the Bifulcos (447).

Sometime before Christmas, 1975, DeMaio went to McFarland's apartment and mixed about three pounds of crystals in the presence of McFarland, Thistlethwaite, and a few other people (447). Thistlethwaite helped DeMaio make the crystals, paid DeMaio \$100, and gave him one ounce of angel dust for his help (449).

3. Roseann Polimeni's Involvement in the Conspiracy

a. Roseann Polimeni's angel dust dealings with Alphonse Bifulco: August-November 1975

Roseann Polimeni testified that she first became familiar with angel dust while she was in high school and experimenting with a wide range of drugs (822).¹⁰ She met Alphonse Bifulco while she was in high school and went out with him for a short time (823). She next saw Alphonse Bifulco again in June 1975 in her neighborhood, in the Richmond Hill area of Queens (824, 826). At the time, Roseann Polimeni was living with her mother, but in August 1975 she moved with Alphonse Bifulco into an apartment in Corona, Queens (828). Miss Polimeni identified at trial a lease to the apartment signed by Alphonse Bifulco and herself. Her name was signed as Roseann Bifulco, although she was never married to Alphonse Bifulco (828).

¹⁰ Miss Polimeni admitted using barbituates, heroin, cocaine, marijuana, and "speed" (825).

Roseann Polimeni lived with Alphonse Bifulco in the apartment until October or November 1975 (831). During this three or four month period, Roseann Polimeni and Alphonse Bifulco sold large amounts of drugs, including angel dust, to various customers in Forest Park in the Richmond Hill section of Queens (832). Alphonse Bifulco would prepare the drugs in "dime" bags and would sell them in twenty-bag batches for which he would get \$160 (832, 836). Angel dust was kept in the refrigerator of their apartment, usually in one pound quantities that were replenished as needed to carry on the business (834, 837).

It was during this period of active drug selling that Roseann Polimeni, Alphonse Bifulco, and Michael Thistlethwaite were arrested, on September 1, 1975, while they were trying to buy angel dust. In fact, the police seized a quantity of angel dust from the jacket pocket of Alphonse Bifulco during a post-arrest search (850, 1271-77). The arrest did not, however, curtail Alphonse Bifulco's angel dust sales with Roseann, which continued for another month (871).

Alphonse Bifulco and Roseann Polimeni's involvement with angel dust was strictly a wholesale-retail business; that is, they bought angel dust in large quantities and sold it directly or through intermediaries to the ultimate consumers. Of course, in addition to selling their products, they smoked angel dust as well (838); but at no time did they make angel dust (835), although they talked about getting a formula to make angel dust and about buying chemicals (839). Indeed, at a later time, after Roseann Polimeni had broken up with Alphonse Bifulco, and had lived with Michael Thistlethwaite, she did purchase angel dust chemicals for Alphonse Bifulco. (895, 912, 1189).

Miss Polimeni stated that her role in the operation was to keep the records of the business (837). She and

Alphonse Bifulco discussed the need to keep such records because of the expansion of their business (838). The records themselves consisted of jottings in two diary-type books, indicating customers, drugs, prices, and profit expectations;¹¹ and these records were seized on September 1, 1975, when Roseann Polimeni was arrested with Alphonse Bifulco and Michael Thistlethwaite (837, 854-855).

b. Roseann Polimeni's angel dust dealings with Michael Thistlethwaite: December 1975

One of Alphonse Bifulco's principal suppliers of angel dust was one Steven Grayson (842). During the time that Alphonse Bifulco and Roseann Polimeni lived together, Grayson moved to Florida, and Roseann and Alphonse discussed the need to find a new source of angel dust. During the course of the conversation several names were brought up, including Thistlethwaite and McFarland, the former being the person with whom they were arrested on September 1, 1975 (843).¹²

After she was arrested, Roseann Polimeni continued to live with Alphonse Bifulco for another month (871). At some point in October or November 1975, she left Alphonse Bifulco to live with her mother (871). In December 1975, she moved in with Thistlethwaite, who, like Alphonse Bifulco, made his living selling angel dust

¹¹ One document showed, for example, that ten pounds of angel dust could be sold for \$150 per ounce, at a cost of \$500 for the chemicals, yielding a sales figure of \$24,000 and a profit of \$23,500 (893).

¹² Roseann Polimeni stated that all of the defendants lived in the same neighborhood, and that they often encountered each other in the streets and frequented the same places (906).

in the same neighborhood (872).¹³ However, Michael Thistlethwaite was more advanced in vertically integrating his operations than Alphonse Bifulco, for as Roseann Polimeni soon learned, he not only sold angel dust, but had purchased the chemical ingredients to make angel dust, and had gone upstate to make it with John McFarland (873, 886-887). Miss Polimeni in fact watched Thistlethwaite preparing chemicals in the apartment and saw angel dust stored there (873).

While she was living with Michael Thistlethwaite, Roseann Polimeni frequently saw John McFarland in the apartment (889). She had known McFarland since 1970 or 1971 and had often seen him in the neighborhood (887). She overheard conversations between McFarland and Thistlethwaite in which they discussed purchasing chemicals and travelling upstate to make angel dust (889). On one occasion in December 1975 or January 1976, she accompanied them to a supply house in New Jersey where they purchased chemicals (890-891).

c. Thistlethwaite's and McFarland's angel dust involvement with the Bifulco Brothers: December 1975

DeMaio testified that he learned of Thistlethwaite's and McFarland's involvement with the Bifulco brothers shortly after DeMaio had told McFarland and Thistlethwaite in November 1975 that he no longer wanted to make angel dust. See p. 9 *supra*. It was during this time that Roseann Polimeni lived with Thistlethwaite and she, too, testified about the angel dust dealings among the

¹³ Miss Polimeni stated that she witnessed a sale of angel dust for \$600 by Thistlethwaite to a man named "Frankie" (892).

¹⁴ In this connection, the record showed that Roseann Polimeni and DeMaio never knew each other, although DeMaio knew that Roseann was living with Thistlethwaite (452, 911).

Bifulcos, Thistlethwaite and McFarland.¹⁴ Thistlethwaite told her that Mario Bifulco wanted him to make angel dust for him, and that someone had threatened Thistlethwaite's grandmother (876). Miss Polimeni knew Mario Bifulco as the brother of her former boyfriend, Alphonse Bifulco (876). She testified that Mario had called Thistlethwaite a few times (1181); that she had smoked angel dust with Mario Bifulco on different occasions; and that Mario Bifulco had provided his brother Alphonse with marijuana (880).

On the same day that Thistlethwaite told her about Mario Bifulco, she met Mario Bifulco in front of Thistlethwaite's apartment house and went with him in his car (881). She spoke to Mario about the threat to Michael's grandmother, and Mario told her that the matter was none of her business (883). They drove in Mario's car towards Long Island, eventually stopping to let an older man, identified as "John" or "Johnny", get in the rear seat of the car (884). Mario had previously told Roseann not to say anything when the man entered the car (1175). The older man asked Mario when he was going to get his money back and "when is this kid [meaning Thistlethwaite] going to do what he is supposed to do so I can get my money back that I laid out" (1244). Mario assured the older man that he would get him his money back and that he would work for "this kid" (885, 1244). Mario then drove Roseann Polimeni back to Thistlethwaite's apartment.

d. Roseann Polimeni's angel dust involvement with the Bifulco Brothers: January-March 1976

Sometime in early 1976, Roseann Polimeni left Thistlethwaite and returned to her mother's home (894). Within a few days she met Alphonse Bifulco, who asked her to help him purchase chemicals. Alphonse and Rose-

ann went to Conso-Lab on January 13, 1976, and paid for three chemicals (895). Alphonse gave her the money and told her that he was going to give the chemicals to Mario, who would in turn give them to Thistlethwaite (912).

Not all of the chemicals were available, and so in February or March 1976, Roseann Polimeni went with Mario Bifulco to collect the remaining chemical, piperidine (1180). During 1976, Roseann Polimeni continued to see Alphonse Bifulco from time to time and bought angel dust from him (904).

4. Corroboration of the Conspiracy

A. The Government showed through the testimony of a New York City police officer that Thistlethwaite, Alphonse Bifulco, and Roseann Polimeni were arrested together on September 1, 1975, while driving in a car in the Woodhaven area of Queens (1268). During the course of a post-arrest search, police officers found a quantity of angel dust in the jacket pocket of Alphonse Bifulco (1271, 1277). Two pads of miscellaneous papers were found in Roseann Polimeni's handbag (1271). These papers were the "business records" of her angel dust operations with Alphonse Bifulco. See p. 13 *supra*.

B. The Government further showed through the testimony of a chemical supply house owner that persons known as Michael Thistlethwaite, Mike "Thistle", and John "Kaene"¹⁵ purchased on different days in June,

¹⁵ The man named John Kaene provided an address of 113-17 Atlantic Avenue, Queens, which was John McFarland's father's address (1502). Secondly, Thistlethwaite admitted in a post-arrest statement that he used the name "Thistle", and Mike Thistle's name appeared on Kaene's receipt, thus indicating to the store owner that the two were related to each other (000). Finally, an employee at another chemical supply house identified John McFarland as the man known to her as John Kane (1486).

July, August, and September 1975 the following chemicals: piperidine, hydrochloric acid, bromobenzene, cyclohexanone, ethyl ether anhydrous, and magnesium turnings.¹⁶ See p. 7 fn 6 *supra*.

C. The evidence showed that one of the ingredients used to make angel dust—ethyl ether—was volatile and pungent; and, for this reason, outdoor places like state parks, were used to manufacture angel dust (1440). Nevertheless, Thistlethwaite apparently tried to make angel dust in his apartment because the superintendent of his building testified that while Thistlethwaite lived in his building, he and other tenants complained to Thistlethwaite a number of times about the smells emanating from his apartment (1324). Thistlethwaite assured his neighbors that the ether was used for films.¹⁷

D. During the course of the conspiracy, on July 23, 1976, John McFarland was arrested in his apartment by New York City police officers, who found bags containing over nine ounces of angel dust in his apartment. In addition, they found a scale and a box containing small envelopes, the kind used to make “nickel” and “dime” bags (1328-1336).

E. Photographs were introduced which showed that Thistlethwaite and McFarland were in the vicinity of the Berg Chemical Company, one of their chemical supply houses, on August 4, 1976 (1252, 1347).

¹⁶ The purchases were as follows: June 24 (\$129); July 2, (\$235); July 8 (\$15); August 19 (\$281); August 20 (\$205); September 3 (\$160).

¹⁷ The superintendent knew that the smell was that of ether because of his forty-five years' experience as a beautician. Ether is used to clean fingernails. (1326).

F. An employee of Consol-Lab identified various receipts for angel dust precursors in the names of Lawrence DeMaio, John McFarland,¹⁸ and Michael Thistle. In addition she identified one receipt, dated November 6, 1975, for an order from Al B-I-F-U-R-L-I [sic], 59-30 108th Street, Queens, New York.¹⁹ The employee identified the dates, customers, and supplies purchased on the receipts.²⁰ Most significantly, she identified John McFarland as the man known to her as John Kaine (1486).

G. The Government and counsel for appellants stipulated that a handwriting expert would have testified that Alphonse Bifulco signed the lease to the apartment in Queens and the Consol-Labs receipt (1500); that Michael Thistlethwaite signed various receipts in the name of Michael Thistlethwaite and Michael Thistle (1501); and that John McFarland signed receipts in the name of John R.(K)aine.²¹ Finally, counsel stipulated that John McFarland provided an address, 113-17 Atlantic Avenue, Richmond Hills, New York, belonging to his father (1502).

H. Counsel further stipulated that a phone number belonging to Thistlethwaite was in operation from Novem-

¹⁸ The address provided by John McFarland was identical to that provided by John Kaene and was stipulated to be that of McFarland's father (*supra*).

¹⁹ The address provided was that of the apartment leased by Roseann Polimeni (as Roseann Bifulco) and Alphonse Bifulco (000). A handwriting expert identified the signature as that of Alphonse Bifulco (1500).

²⁰ Purchases of chemicals and equipment (including ethyl ether anhydrous, gallon drums, safety lenses, and stirring rods) were made on October 17, November 6, and November 7, 1975; and on June 24, June 25, August 6, August 10, September 10, and November 24, 1976 (1484).

²¹ There was some difficulty in determining whether the first letter of the last name was "R" or "K", but the stipulation left no doubt that the receipt in Raine's or Kaine's name was in McFarland's hand (1500-02).

ber 5, 1976 and was disconnected on December 9, 1976 (1500); that another phone number for Thistlethwaite was connected on December 2, 1975 and in use through October 21, 1976; and that a phone number was registered to John McFarland and connected on October 27, 1976 (1502). McFarland's phone number and Thistlethwaite's name were found in Alphonse Bifulco's phone book after his arrest on federal narcotics charges in January 1977 (1403, 1414). Similarly, John McFarland's phone book contained a phone number for Alphonse Bifulco which was linked to Alphonse's girlfriend. It was at this very girlfriend's house that Alphonse was arrested (1369).

I. After being arrested on January 4, 1977, and advised of his rights by D.E.A. Agent DiGennaro and after being shown a copy of the arrest warrant, John McFarland stated, "you may have me on possession of dust, but nothing else" (1364). Special Agent Abbott, the lead agent on this case, testified that he first saw John McFarland at the Drug Enforcement Administration headquarters on January 4, 1977, after he had been arrested by Agent DiGennaro (1396). He asked McFarland if he had been advised of his rights and if he had understood his rights (1397). When McFarland said that he did, Agent Abbott told him that he knew that he had been to Berg Chemicals and to Consol-Labs and asked him what other chemical supply houses he visited (1400). McFarland said that he had been to City Chemical and to a place in New Jersey (1401). Agent Abbott further testified that McFarland provided as his address 8625 112th Street, Richmond Hills, New York, and a phone number, 847-0692 (1403). The latter phone number appeared in Alphonse Bifulco's phone book under the name "Jack" (1403).

Michael Thistlethwaite was placed under arrest on January 5, 1977, advised of his constitutional rights, and taken to Drug Enforcement Administration head-

quarters (1381). The arresting agent did not question Mr. Thistlethwaite (1386), but on the drive to the Drug Enforcement Administration offices, he was asked by Thistlethwaite to read the complaint again. After this had been done, Thistlethwaite said, "that's the part I don't understand. It says manufacture. I didn't steal anything from anybody" (1386).

Agent Abbott spoke to Michael Thistlethwaite the night he was arrested (1404). Thistlethwaite stated that he had been advised of and had understood his rights (1404). He also said he did not understand what a conspiracy was; consequently, Agent Abbott advised him of its meaning (1405). Agent Abbott then told Thistlethwaite that he had certain documents showing his involvement in the conspiracy. Thistlethwaite said he wanted to see the documents (1405). Agent Abbott showed Thistlethwaite photostatic copies of receipts from Consol-Labs (1405). Thistlethwaite acknowledged that his signatures and address appeared on the receipts shown to him (1406). Thistlethwaite was also shown the photographs taken by D.E.A. agents across the street from Berg Chemical on August 4, 1976, and Thistlethwaite admitted that he was in the pictures (1406). Thistlethwaite further acknowledged that he was the "Mike Thistle" on the Harry Ross Company receipts (1407). Finally, Agent Abbott showed Thistlethwaite two pieces of paper which he had gotten from the officer who had arrested Thistlethwaite on September 1, 1975. Thistlethwaite identified the papers, and said that he had had them last when he was arrested and wished that he had not had them. He said the papers contained a list of ingredients for angel dust (1408). Thistlethwaite admitted buying the chemicals, but denied making angel dust, and he claimed that he did not know how to make angel dust (1410).

Agent Abbott first saw Alphonse Bifulco on January 7, 1977. Abbott participated in the arrest (1411). He next saw Alphonse Bifulco at D.E.A. offices and asked him if he understood his rights. Agent Abbott told Alphonse Bifulco that he was being arrested for a conspiracy regarding angel dust. Alphonse Bifulco said he did not know what angel dust was (1413). He denied ever living on 108th Street in Queens (1413). Agent Abbott also read two names from his phone book: "Mike T" and "Mike F" (1414).²²

B. The Defense Case

None of the appellants testified. Mario Bifulco, who was acquitted, did not testify. There was one defense witness, Marguerita Stratton, who was called by Alphonse Bifulco.

Mrs. Stratton testified that she knew Roseann Polimeni for eight or nine years (1518). She said that Roseann Polimeni was known as a drug dealer (1519). She knew that Miss Polimeni and Alphonse Bifulco were living together and that they had separated in September or October 1976 (1519).²³ According to Mrs. Stratton, Miss Polimeni told her that she was very upset about Alphonse's leaving her (1519); Mrs. Stratton said that Alphonse Bifulco did not want to get involved in Miss Polimeni's angel dust dealings (1520). Roseann Polimeni told Mrs. Stratton that she would try to "get even" with Alphonse (1520). She was known to carry a gun for "protection" (1522).

²² The phone number for "Mike T" was that of Thistlethwaite. The evidence further showed that Larry DeMaio's phone book had phone listings for McFarland and Thistlethwaite (665).

²³ Miss Polimeni stated that she and Alphonse separated in October 1975 (831).

On cross examination, Mrs. Stratton admitted that she would often see Alphonse Bifulco with Roseann Polimeni in Forest Park (1526).

ARGUMENT

POINT I

The Government's Proof at Trial Established The Single Conspiracy Charged in the Indictment.

A. Appellants Bifulco and McFarland contend that the Government's proof at trial did not establish the single conspiracy charged in the indictment, but rather two (and perhaps three) separate conspiracies.²⁵ They further contend, as they must do in order to mandate reversal of their convictions, that the alleged proof of the several conspiracies prejudiced them, principally by transferring the proof of guilt of one defendant in one conspiracy to another defendant involved in an allegedly separate conspiracy. In this regard the "material inquiry is not the existence but the prejudicial effect of the variance." *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Six Kue Chin*, 534 F.2d 1032, 1035 (2d Cir. 1976); *United States v. Agueci*, 310 F.2d 817, 827 (2d Cir. 1962). We submit that the arguments are totally without merit, and that the Government's proof showed beyond any reasonable doubt that appellants agreed and acted together to manufacture and sell angel dust.

²⁴ It was in Forest Park that Polimeni and Alphonse Bifulco conducted many of their drug sales (838).

²⁵ Thus, for example, Bifulco suggests that the dealings between DeMaio, Thistlethwaite and McFarland during the summer and fall of 1975 constituted one conspiracy, and that a separate conspiracy involving the Bifulcos (plus Thistlethwaite McFarland, DeMaio and others) did not commence until late November 1975.

At the outset, we note that the claim of multiple conspiracies is not a novel one in a drug conspiracy appeal, *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir. 1974), and that the Supreme Court and this Court have properly rejected the claim of multiple conspiracies in all but a few of the relevant cases, e.g., *Kotteakos v. United States*, 328 U.S. 750 (1946); *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975); *United States v. Miley*, 513 F.2d 1191 (2d Cir. 1975) (multiple conspiracies found but conviction upheld because no showing of prejudice). At the same time, we are mindful of this Court's admonitions in *United States v. Sperling*, 506 F.2d 1323, 1340-141 (2d Cir. 1974), to avoid indictments charging large numbers of defendants in single conspiracies where multiple trials may legally be required. See also *United States v. Tramunti*, 513 F.2d 1087, 106 (2d Cir. 1975).

We submit that the facts in the instant case fall well within the spectrum of cases where the claims of multiple conspiracies have been rejected. Indeed, the facts here suggest far more strongly the existence of a single illegal agreement—which is the gist of the crime—than the facts of other cases where this Court has rejected the claims of multiple conspiracies. The only question which this Court must resolve here is whether Michael Thistlethwaite, John McFarland, and Alphonse Bifulco were involved in a conspiracy to manufacture, distribute, or possess with intent to distribute angel dust. The focus of this Court's attention can be narrowed to a small group of individuals and, in fact, to a short period of time—principally between October and December 1975—when the major conspiratorial activities occurred.

Viewed in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60 (1942), the evidence showed that after Larry DeMaio had temporarily terminated his relationship with Thistlethwaite and McFarland in November 1975, he was advised by the former that dealings in angel dust had already been started with two brothers, Alphonse and Mario Bifulco. Thistleth-

waite asked DeMaio if he could inspect a batch of angel dust that he was making for the Bifulcos. In December 1975, DeMaio accompanied Thistlethwaite to an apartment where he met the Bifulco brothers and gave his advice with respect to a chemical reaction (involving angel dust) then in progress. DeMaio and Thistlethwaite left the apartment hurriedly, and later that month DeMaio helped Thistlethwaite in McFarland's apartment make angel dust in order to help Thistlethwaite "pay off" the Bifulcos. See pp. 10, 15, *supra*. We submit that on DeMaio's testimony *alone*, the jury might reasonably have concluded that *prior* to DeMaio's meeting the Bifulcos, Thistlethwaite and McFarland had allied themselves with the Bifulcos in an angel dust operation.

The jury did not, however, have to rely solely on Lawrence DeMaio's testimony. Roseann Polimeni, too, testified regarding the relationship between Thistlethwaite and the Bifulcos. Like DeMaio, she became aware of Thistlethwaite's arrangements with Mario Bifulco after those arrangements had apparently soured, and she tried actively to repair the relationship by acting as an intermediary between them. See pp. 14-15 *supra*. Her testimony showed, too, that McFarland and Thistlethwaite were actively working together, during the time she lived with Thistlethwaite, to make and sell angel dust. Finally, her previous relationship with Alphonse Bifulco, corroborated in fact by Mrs. Stratton (Alphonse Bifulco's witness), as well as the evidence of the arrest of Roseanne, Alphonse Bifulco and Thistlethwaite on September 1, 1975 (while the three were trying to buy angel dust), could reasonably have led the jury to believe that Alphonse was allied with his brother, Thistlethwaite, and McFarland. Alphonse had in fact mentioned the latter two as potential suppliers of angel dust when his previous angel dust supplier, Steven Grayson, moved to Florida in September 1975. See p. 13, *supra*.

The testimony of DeMaio and Polimeni, who did not even know each other,²⁶ was corroborated by documentary evidence showing that Alphonse Bifulco, Michael Thistlethwaite, and John McFarland were all buying precursors for angel dust during the same period of time: the summer and fall of 1975. In fact, the evidence showed purchases of precursors by all appellants in 1976. See p. 18 fn. 20, *supra*. Furthermore, when Alphonse was arrested on the instant charges in 1977, his phone book contained the phone numbers for Mike Thistlethwaite and John McFarland.²⁷ John McFarland's phone book contained a listing for "Al", which traced back to Alphonse Bifulco's girlfriend, at whose home he was arrested in January 1977.

In summary, then, the jury had ample evidence to convince it beyond a reasonable doubt that McFarland, Thistlethwaite and Alphonse Bifulco were allied together in an angel dust conspiracy. The evidence also showed, moreover, that all three appellants were closely allied, during relevant periods, with the other major conspirators—particularly DeMaio and Roseann Polimeni. Nor is the case against Alphonse Bifulco or any other appellant weakened by the fact that the major evidence implicating Alphonse in conspiratorial activities with DeMaio, Thistlethwaite and McFarland related to November and December 1975, after the conspiracy (involving, among others, DeMaio, Thistlethwaite and McFarland)

²⁶ Although appellants charge that the fact that two co-conspirators did not know each other is proof that multiple conspiracies existed, it is well settled that a single conspiracy can exist despite changes in the membership, and even if some of the conspirators did not know each other. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947), *United States v. Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *United States v. Sir Kue Chin*, 534 F.2d 103 (1976).

²⁷ Indeed the evidence showed that the phone for McFarland had not been installed until late in 1976, which we submit indicates that Alphonse Bifulco and McFarland, at least, were in contact despite the earlier disagreements between Thistlethwaite and Mario Bifulco (1502).

had already commenced. In any event, the evidence clearly linked Alphonse to other conspirators as early as September 1, 1975.

As we now show, this Court's decisions dealing with the issue of single versus multiple conspiracies clearly support the finding of a single conspiracy here. First, and most importantly, it is clear beyond any doubt that the appellants knew each other (and other named conspirators) and were equally involved in attempts to make and sell angel dust. Appellants do not themselves seriously deny their individual involvement in buying chemicals or in selling angel dust. Their claim simply is that they did not agree to do it together. Obviously the number of individuals here was small and the organizational structure relatively undifferentiated: all were involved in all aspects of the business.

By way of contrast, in a great many drug conspiracy cases with which this Court is familiar, the numbers of defendants and charges have been relatively large; the evidence clearly showed different functional levels occupied by defendants who may have lived in different cities or countries and did not know each other; and the conspiracies lasted for much greater lengths of time, with frequent changes of personnel, and occasional changes of drugs sold. Even under such facts, this Court often found single conspiracies. See, e.g., cases cited pp 27-29, *infra*.

There are at least three cases of which we are aware where the Supreme Court or this Court has upheld a finding of multiple conspiracies. In *Kotteakos v. United States*, 328 U.S. 750 (1946), *supra*, the indictment named thirty-two defendants, nineteen of whom were brought to trial on a conspiracy which the proof showed had at least eight separate objectives. In *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), this Court reversed conspiracy convictions where the indictment charged twenty-nine individuals (and listed thirty-one additional

unindicted co-conspirators). Count One of the indictment charged all twenty-nine of the defendants with conspiracy and the charge listed thirteen overt acts.²⁸ The remaining eight counts charged many, though not all, defendants with substantive narcotics possession and distribution violations. Seventeen defendants actually went to trial, and not a single defendant was convicted of a single substantive count. In *United States v. Miley*, *supra*, where this Court found multiple conspiracies but did not reverse because of the absence of a showing of prejudice, the indictment charged nine defendants with a conspiracy to sell lysergic acid diethylamide (LSD) and phencyclidine (angel dust) and with eight substantive counts. Five defendants proceeded to trial, where the evidence showed sporadic drug transactions involving defendants who did not even know each other.

The *Kotteakos*, *Bertolotti*, and *Miley* holdings are, however, special exceptions to the general tendency by this Court to find single conspiracies where the evidence shows large scale drug operations involving mutual interdependence among numbers of defendants. Such evidence permits inferences that conspirators at a particular level must know that others are performing similar roles. In *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975) this Court held in a narcotics case involving thirty defendants in a fifteen count indictment that:

[w]hile much of the evidence did indicate that there were two spheres of operation in the narcotics conspiracy that was established, there was sufficient proof of mutual dependence and assistance to warrant treatment of the two spheres as one general business venture.

²⁸ By way of contrast, the indictment in the case on appeal charged one conspiracy, no substantive acts, and did not allege any overt acts. See *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975).

In *United States v. Bynum*, 485 F.2d 490, 495-97 (2d Cir.), vacated and remanded on other grounds, 417 U.S. 903 (1974). This Court rejected the claim of multiple conspiracies where the indictment charged fourteen defendants with a drug conspiracy. See also *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964); *United States v. Arroyo*, 494 F.2d 1316, 1318-19 (2d Cir.), *cert. denied* 419 U.S. 827 (1974); *United States v. Sperling*, *supra*, 506 F.2d at 1340-43.

The evidence here, in contrast to cases where claims of multiple conspiracies have been sustained (or indeed denied), showed a conspiracy which was of relatively short duration and where the appellants clearly knew each other and were *equally* involved in the scheme to make and sell angel dust. There is not any need in this case, therefore, to employ the usual imagery—"links, chains, spokes, hubs"—to link a large number of loosely connected defendants to a single conspiracy. There are two reasons for this. One, the nature of the drug angel dust is such that it encourages vertically integrated operations among a small group of people. Since it can be made relatively simply and relatively cheaply, there is little need to have different functional levels as in the usual drug smuggling operation—*e.g.*, financiers, distributors, couriers, packagers, and salesmen. All of these functions can be (and the evidence here showed that they were) restricted to a relatively small group. Two, the evidence showed beyond any doubt that all of the appellants lived near each other; purchased the same precursors for angel dust; kept each other's phone numbers; shared the sexual favors of the same woman, who admitted her involvement in the conspiracy; and joined together in the same objective: to make and sell angel dust.

DeMaio and Polimeni testified at length regarding the alliance between Thistlethwaite, McFarland, and the Bi-

fulco brothers, an alliance which was spurred for at least four reasons. First, DeMaio decided after a time not to make angel dust with McFarland and Thistlethwaite. Second, Alphonse Bifulco needed to secure a new source of angel dust after his main supplier went to Florida. Third, Thistlethwaite and Alphonse Bifulco knew each other, as was evidenced by their being arrested together on September 1, 1975. Fourth, the three appellants realized that with adequate financing and joint efforts, the rewards could be enormous. The evidence showed, in fact, that based upon DeMaio's and Polimeni's calculations of the profit margins for given quantities of angel dust and the actual amounts of chemicals purchased, the appellants were dealing in nearly a one million dollar business (1565).

Finally, we submit that the reasoning of this Court in *United States v. Moten*, — F.2d — Slip op. 5769 (2d Cir. September 6, 1977), should control the decision on this appeal. In *Moten*, the indictment charged thirty-three defendants with a drug conspiracy for an eight year period. There were in total thirty-six substantive crimes charged. Twenty-two defendants went to trial. The evidence showed a massive narcotics organization with major centers in New York, Miami, Washington, D.C., and Chicago. In finding a single conspiracy, this Court rejected the claim that multiple conspiracies could be inferred from the fact that two drugs were involved (5776) or because of the territorial separation of the distributors (5777). This Court noted that the relationships among the conspirators was neither casual nor spasmodic. The jury could believe the testimony of the main cooperating witness, "who was in the best position to know the perimeters of the conspiracy and the extent of the participation of the defendants" (5778). As this Court noted, the evidence was bolstered by other witnesses and documentary evidence. In the instant case, the persons best able to testify about the agreement

among appellants and other conspirators were precisely those intimately involved with them, Larry DeMaio and Roseann Polimeni. However, the jury, as in *Moten*, was not limited to their testimony. The evidence of chemical purchases amply proved the nature and size of the business and the large quantity of drugs. The specialized nature of the business, which required rudimentary, though jealously guarded, knowledge of chemical techniques,²⁹ established the need for mutual interdependence.

In summary, we submit that the overwhelming evidence in this case showed that the appellants were closely linked in a single agreement to manufacture and sell angel dust.

B. Even assuming *arguendo*, however, that more than one conspiracy was proved, that fact by itself would not require reversal unless appellants can establish specific prejudice to them. *Berger v. United States*, 295 U.S. 78, 81-84 (1935). The relevant inquiry is

whether the defendants . . . were afforded a fair trial. Was the jury reasonably able to consider the evidence as to the guilt of each, independent of the evidence as to guilt of his fellow defendants. Have the defendants been able to establish as they must, that failure to sever prejudiced their right to a fair trial. *United States v. Moten, supra*, slip op. 5781.

See *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir.), *cert. denied*, 402 U.S. 999 (1971). We submit that none of the appellants can show any prejudice to him for the following reasons:

²⁹ DeMaio testified that he treated his knowledge as a monopolist would treat his product or service—by closely guarding his knowledge of the formula for making angel dust (544, 646).

First and foremost, as appellants effectively admit, each of the appellants was involved substantially to the same degree as the others in the purchase of chemicals and in the manufacture and sale of angel dust. This was not a case, for example, where the Government tried together, on charges of a single conspiracy, people of varying levels of culpability, such as might be expected in a heroin-smuggling scheme involving financiers, importers, distributors, sellers, and couriers. See, e.g., *United States v. Tramunti*, *supra*; *United States v. Bertolotti*, *supra*.

Second, we submit that even if two conspiracies were alleged in the indictment, the two conspiracies might have been properly joined under Federal Rule of Criminal Procedure 8(a).³⁰ There were pre-trial motions for severance based principally on the District Court's decision to admit certain post-arrest statements and seizures, but these motions were denied (269). We submit that the District Court's ruling not to order severances prior to or during trial must be accorded considerable deference because the Judge had the opportunity at first hand to determine whether the trial was manageable. *United States v. Moten*, *supra*, 5783; *United States v. Aviles*, 274 F.2d 179, 194 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960).

³⁰ Rule 8(a) provides:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Thus, even if the conspiracy charge had not encompassed events prior to December 1975, evidence relating to the alliance of DeMaio, Thistlethwaite and McFarland would have been admissible.

It is obvious that the decision of McFarland and Thistlethwaite to ally with the Bifulcos flowed naturally from their desire to produce angel dust, a desire which was manifested by their earlier arrangement with DeMaio. Proof of the DeMaio, Thistlethwaite, McFarland alliance was admissible to show the conspiracy itself, its origins, background, and breadth, as well as the motives, intent, and common plans and schemes of the participants. *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976); *United States v. Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974).

Third, the issues were not so complicated as to be beyond the comprehension of the jury. Drug cases are not comparable to antitrust or securities fraud cases which involve complex factual and legal issues. The operation of the conspiracy, moreover, was easily understandable after two participants—Roseann Polimeni and Larry DeMaio—testified for the Government. The summations, both by the Government and the defense were relatively short. Cf. *United States v. Moten, supra*, at 5781. Mario Bifulco's acquittal is some evidence in fact that the jury was able to differentiate among the participants. *United States v. Moten, supra*, 5781; *United States v. Borelli, supra*, at n.4.³¹

Fourth, there has been no showing whatever of any *specific* prejudice to any appellant. Instead appellants' arguments have been couched generally as "transfer of guilt" or "spill-over" effects. The allegation of prejudice finds no substantiation in the record. There was no evidence of prior drug dealing by any of the defendants which might possibly have tainted the case against the others. The only evidence of violence, or potential vio-

³¹ Significantly, the evidence against Mario Bifulco consisted solely of the testimony of Roseann Polimeni and Larry DeMaio. There was no physical evidence—in particular chemical receipts—indicating his participation in the conspiracy.

lence—the threat to Thistlethwaite's grandmother—could not possibly have prejudiced Thistlethwaite, and was certainly admissible against the Bifulcos to show their method of operation. The fact that Roseann Polimeni was arrested for possession of a gun when she was arrested with Alphonse Bifulco and Michael Thistlethwaite was brought out not by the Government, but by the defense (1048). In short, to the extent (if any) that a separate conspiracy was proved, we find it difficult to understand how any of the appellants could have thereby suffered prejudice.

POINT II

The District Court Properly Charged The Jury on the Issue of Conspiracy.

Appellants Bifulco and McFarland assert that the District Court improperly charged the jury regarding conspiracy in his original charge, and then compounded the error by failing to instruct the jury properly in response to a jury note. We submit the arguments are without merit.

Before proceeding to the charge itself we should point out that throughout the trial, in response to defense counsel requests, the District Court cautioned the jury that they were to limit any incriminating evidence to the defendant involved, unless and until the Government proved both a conspiracy and that the incriminating evidence—statements or tangible evidence—was made during the course of and in furtherance of the conspiracy (395, 415, 851).

The District Court advised the jurors of the essential elements of the crime charged (1663).³² It further told

³² The entire charge is reproduced in appellant McFarland's Appendix.

them that they would have to find that the purpose of the conspiracy was to manufacture, distribute, or possess with intent to distribute phencyclidine (1663). It cautioned them that it was not enough that the Government showed that the defendants actually manufactured, distributed or possessed the drug, and reminded them that the essence of the crime charged was that the defendants entered into an agreement (1665-1666). Similarly, it cautioned them that mere similarity of conduct or association and discussion of common aims or plans did not establish conspiracy. The District Court told the jury that:

In order to find any of the defendants guilty, you must be convinced beyond reasonable doubt as to that particular defendant that he was a member of a conspiracy and that *at least one of the three purposes I have just mentioned was a part of that conspiracy* (1667) (emphasis added).

With respect to the issue of multiple conspiracies, Judge Costantino charged as follows:

Proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, if you are satisfied that such a conspiracy existed, you must determine who were the members of that conspiracy.

If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, then you must acquit the defendant. In other words, to find a defendant guilty

you must find that he was a member of the conspiracy charged in the indictment and not some other conspiracy. (1669).³³

We submit that the District Court's charge completely and fully complied with the previous holdings of this Court in this area. See *e.g.*, *United States v. Borelli*, *supra*, 382; *United States v. Bynum*, *supra*, 497.

Appellants contend, however, that Judge Costantino improperly charged the jury in response to a note sent out during deliberations. The note read:

When he [the Judge] charged conspiracy to manufactures [sic], distribution and possession, if we find any individual innocent of any one are we supposed to acquit him of the whole charge (1707).

In response to the note, Judge Costantino clearly told the jurors that they had to find whether a conspiracy existed and, if so, whether it encompassed any or all of the purposes listed in the indictment (manufacturing, distributing, or possessing with intent to distribute). He then told the jurors that if they found that any of the defendants was involved in one of the objectives, but that objective was not one of the purposes of the conspiracy, then they had to acquit that defendant (1708).³⁴ The jury evidently had no difficulty with the supplemental charge; the jury sent out no additional notes, and acquitted Mario Bifulco. We fail to see any merit to appellants' claims that either the initial or supplemental

³³ In our view these instructions dispose of McFarland's argument (Br. 17-20) that the District Court gave inadequate instructions on separate versus multiple conspiracies.

³⁴ The entire second charge is reproduced in the appellant McFarland's appendix.

charge did not fully and accurately state the law of conspiracy.³⁵

Nor do we see any merit to the claim, by appellant Bifulco, that the District Court's failure to marshal the evidence in this case somehow impeaches the verdict since we know of no authority that required him to do so. The fact that the District Court did not marshal the evidence, which was never requested by counsel for appellants at trial, supports our argument that the facts in this case were relatively simple and the issues clear enough that the jury did not need any additional assistance that trial counsel could not provide.

POINT III

There Was More Than Sufficient Evidence To Find Appellant Alphonse Bifulco Guilty of the Conspiracy Charged.

We incorporate by reference all of our arguments set forth under Point I, which show that considered in the light most favorable to the Government, *Glasser v. United States*, *supra*, the evidence was more than sufficient to establish that Alphonse Bifulco conspired with a number of people, including Thistlethwaite and McFarland, to manufacture and sell angel dust.

In addition to the evidence already outlined which established Alphonse Bifulco's participation, the jury could have considered Alphonse Bifulco's post-arrest

³⁵ Appellant Bifulco wonders (Br. 14) which conspiracy the jury found. There is however no legal requirement that the jury render in effect a special verdict to satisfy his curiosity. It is legally sufficient that the jury found an agreement among appellants to achieve only one of the objectives of the conspiracy. *Frohwerk v. United States*, 249 U.S. 204, 209-10 (1919).

statements as circumstantial evidence of guilt. *United States v. Parness*, 503 F.2d 430, 438 (2d Cir.), *cert. denied*, 419 U.S. 1105 (1975). Agent Abbott testified that Alphonse Bifulco denied ever living on 108th Street in Queens and knowing what angel dust was. Yet, the evidence showed that he and Roseann Polimeni lived on 108th Street for several months in 1975 when they were selling angel dust, and that he signed the lease for the apartment. Moreover, the evidence showed that Alphonse Bifulco signed a Conso-Lab receipt for ethyl ether anhydrous, a precursor of angel dust, and provided the 108th Street address on the receipt. (See pp. 18, 21, *supra*).

Appellant Bifulco's main protest seems to rest upon the Government's reliance upon the testimony of fellow conspirators, Roseann Polimeni and Larry DeMaio, but we need cite no authority to justify the use of cooperating conspirators' testimony, particularly in the context of drug cases. Nor do we find any merit to appellant Bifulco's charge that so-called hearsay statements were used to establish the conspiracy. The testimony of DeMaio and Polimeni was, of course, subject to cross-examination and therefore not hearsay. To the extent that they testified to statements made by the appellants, and Mario Bifulco, during the course of and in furtherance of the conspiracy, those statements are admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence.³⁶ Moreover, Alphonse Bifulco's statements to Roseann Polimeni were not hearsay under Rule 801(d)(2)(A),³⁷ and were relevant to show his motives, intent, and plans. We repeat again that the District Court cautioned the jury many times during the trial that declarations of

³⁶ Rule 801(d)(2)(E) provides that a statement is *not* hearsay if it is a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. (Emphasis added).

³⁷ Rule 801(d)(2)(A) provides that a statement is not hearsay if offered against a party and is his own statement.

a person could not be held against a non-declarant until the jury was convinced both that a conspiracy existed and that the statement offered was made in the course and in furtherance of the conspiracy.³⁸

POINT IV

The District Court Properly Admitted Michael Thistlethwaite's Post-Arrest Statements Into Evidence.

Appellant Thistlethwaite contends that the statements which he made following his arrest should have been suppressed because the Government did not satisfy its burden of proving that the statements (which were given following Thistlethwaite's indictment)³⁹ were given after This-

³⁸ We are at a loss to unders and Alphonse Bifulco's assertion that DeMaio's testimony that Thistlethwaite and the Bifulco brothers were allied is hearsay. DeMaio was subject to cross-examination on his identification of the Bifulcos and on his statements regarding his meeting with them.

³⁹ The indictment was filed on December 30, 1976, and Thistlethwaite was arrested a few days later. Appellant Thistlethwaite does not now and did not at trial object to the admission of his post-indictment statements on *Massiah* grounds. Rule 103 of the Federal Rules of Evidence requires that timely objection be made "stating the specific ground of objection, if the specific ground was not apparent from the context." Thistlethwaite's failure to object specifically to his post-indictment statements on *Massiah* grounds waives his right to appellate review on this issue. *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975); *United States v. Rose*, 525 F.2d 1026, 1027 (2d Cir.), *cert. denied*, 96 St. Ct. 1432 (1976). Failure to object waives any right to benefit from the requirement of the exclusionary rule that evidence obtained in violation of the Fourth Amendment is inadmissible. *United States v. Natale*, 526 F.2d 1160, 1172-73 (2d Cir.), *cert. denied*, 96 S. Ct. 1724 (1976) (failure to object to admission of notebook allegedly seized illegally). Under the same reasoning, we submit that in this case, Thistlethwaite's failure to object on Sixth Amendment grounds waived his right to appeal on that basis. We further submit, for

[Footnote continued on following page]

Thistlethwaite had freely and voluntarily waived his Fifth and Sixth Amendment rights. *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Satterfield*, 558 F.2d 655 (2d Cir. 1976).

Prior to trial, a suppression hearing was held with respect to the post-arrest statement made by each of the appellants. Special Agent Arthur Anderson testified that he arrested Thistlethwaite at his home, advised him of his constitutional rights, and read him a copy of the warrant for his arrest. The rights were read to Thistlethwaite from a card, and Thistlethwaite never asked for an attorney (152). Anderson advised Thistlethwaite *not* to make any statements (133).⁴⁰ In the car ride on the way to the Drug Enforcement Administration offices, Thistlethwaite asked Anderson to read the complaint once more. Anderson did so, after which Thistlethwaite said, "[t]hat's the part I don't understand, its says manufacturing. I didn't steal anything from anyone" (135). We submit that this statement, which was totally unexpected, was admissible even without a knowing waiver of counsel. *United States v. Duffy*, 479 F.2d 1038 (2d Cir.), *cert. denied*, 414 U.S. 978 (1973).

At D.E.A. headquarters, Special Agent Abbott spoke to Thistlethwaite. He first asked the arresting agents if they had advised Thistlethwaite of his rights, and the agents said that they had advised him (80). Agent Ab-

the reasons stated, *infra*, that the admission of Thistlethwaite's post-indictment statements did not constitute plain error because the admission of the evidence under the circumstances was not of such gravity as to constitute a denial of due process. Federal Rule of Evidence 103(d).

⁴⁰ Agent Abbott testified during the suppression hearing that he was the lead agent on the case and instructed his agents *not* to question the individuals they arrested (156).

bott then asked Thistlethwaite if he had been advised of and had understood his rights. Thistlethwaite responded affirmatively (123). Abbott then asked him if he knew why he had been arrested. Thistlethwaite said that he did not, and Abbott then explained that he had been arrested pursuant to a bench warrant charging him with conspiracy to manufacture and distribute phencyclidine (83). In response to Thistlethwaite's question, Abbott explained the meaning of conspiracy to him and showed him certain documents. Thistlethwaite identified his documents, which he had with him when he was arrested with Alphonse Bifulco and Roseann Polimeni on September 1, 1975 (85). In response to Abbott's statement that the writing on the documents contained the formula for angel dust, Thistlethwaite stated that it was only a list of ingredients for angel dust (85). Thistlethwaite admitted that he had purchased angel dust ingredients, but denied ever making it (86-87). The conversation between Agent Abbott and Thistlethwaite took about fifteen minutes, and ended immediately when Thistlethwaite asked Abbott for an attorney (109). Thistlethwaite did not testify during the course of the suppression hearing, and Judge Costantino found, after a thorough hearing, that the post-arrest statements of Thistlethwaite should not be suppressed (269).⁴¹

We submit that the Government showed fully that Thistlethwaite's statements were given freely and voluntarily and after he had knowingly waived his rights, including the right to counsel, *United States v. Satterfield, supra*. In this connection we note that the statements that he made were not confessions, but rather simply acknowledgements

⁴¹ Of the appellants, only McFarland testified in the suppression hearing. His post-arrest statements were not suppressed nor were those of Alphonse Bifulco. However, the post-arrest statements of Mario Bifulco were suppressed. In addition, the seizure of a small amount of marijuana from Thistlethwaite on September 1, 1975, was also suppressed.

that he had purchased otherwise legal chemicals at chemical supply houses. He denied conspiring with anyone to make angel dust and denied knowing how to make it. In short, his statements were simply identifications of physical evidence presented to him—photographs of him near a chemical supply house and chemical receipts bearing his name—which would have been in any case linked to him.⁴²

Moreover, there is nothing in the record which would show that Thistlethwaite did not waive his right to counsel and against self-incrimination voluntarily and with a full appreciation of the significance of his statements. He did not testify during the suppression hearing and there is no evidence that he was an individual "distracted, upset, weeping, and obviously out of control" while in custody. *United States v. Satterfield, supra*. It would also appear that Thistlethwaite, having been arrested one time prior to the occasion at issue, was familiar with his rights. *United States v. Lord*, — F.2d — (2d Cir. November 15, 1977), Slip op. 347, 361.⁴³

⁴² Thistlethwaite had no right not to provide handwriting examples which would have linked him to the chemical receipts. *United States v. Dionisio*, 410 U.S. 1 (1973). At trial, Roseann Polimeni identified Thistlethwaite in a photograph taken across the street from Berg Chemical Company (1252, 1347).

⁴³ We note that appellant quite correctly did not request at trial (nor did the District Court give) jury instructions pursuant to Title 18, United States Code, Section 3501(a), which provides:

In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to

[Footnote continued on following page]

POINT V

The District Court Did Not Err In Refusing To Declare A Mistrial When Larry DeMaio Testified That a Person in an Unrelated Angel Dust Case Had Been Sentenced to Five Years Probation and Ordered To Pay a Fine of \$2000.

Appellant Thistlethwaite alleges that the District Court erred in refusing to declare a mistrial when Larry DeMaio testified, on redirect examination, that another person, Joseph Mazzio, not at all involved in the case on appeal and not connected in any way to any appellant, received a sentence of five years' probation and was ordered to pay a fine of \$2000 in an angel dust case. Thistlethwaite claims he was prejudiced by the fact that the jury, having heard this testimony, "would have no alternative but to feel that if, in fact, they convicted these defendants they would receive the same sentence." (Thistlethwaite's Brief, p. 15). The claim of prejudice is on its face absurd, and not surprisingly, it is not supported by any authority. Moreover, it is remarkable that Thistlethwaite would raise the issue since by his cross-examination of DeMaio he prompted the very line of questioning that led to the response protested.

give such weight to the confession as the jury feels it deserves under all the circumstances.

Thistlethwaite, as previously noted, did not testify at trial, and on summation, his counsel did not contest the voluntariness of the statements, but implied simply that they were not made because there were no tape recordings of them in evidence (1626). There was thus little, if any, evidence from which the jury could infer that the statement was involuntary. In these circumstances, as this Court has recently held, Section 3501(a) does not require that the jury be specifically charged on voluntariness. *United States v. Frank Tillman Lewis*, F.2d (2d Cir. November 21, 1977), Slip op. *United States v. Fuentes*, F.2d (2d Cir. September 14, 1977) Slip op. 5883, 5896-99; *United States v. Diop*, 546 F.2d 484 (2d Cir. 1976); *United States v. Lucchetti*, 533 F.2d 28, 40 (2d Cir.) cert. denied, 429 U.S. 849 (1976); *United States v. Barry*, 518 F.2d 342 (1975).

The testimony regarding the sentence emerged as follows: On direct examination, Larry DeMaio testified that he had been arrested in May 1976 by federal narcotics agents and subsequently indicted with fourteen others for conspiracy to manufacture and sell angel dust. DeMaio pleaded guilty in October 1976 to that indictment, which did not involve any of the appellants on this appeal (382). DeMaio agreed to cooperate with the Government prior to entering his plea of guilty but had not yet been sentenced when the trial in the instant case began (383).

On cross-examination, appellant Thistlethwaite questioned DeMaio at great length about his prior drug dealings, and asked him specifically about his drug dealings with a large number of people, including some of those with whom he was indicted on the case in which he had pleaded guilty (547). At the close of his cross-examination, Thistlethwaite's counsel read DeMaio's responses to the District Court at the time he entered his plea of guilty to the indictment in which he was a defendant. We reproduce in full the portion read and the following questions posed by counsel:

"Court: Did you know at the time, No. 1, to get involved with the manufacture of angel dust with the people you have mentioned as an agreement, was against the law?

"Defendant: Yes.

"Court: Did you intend to manufacture this angel dust with the people you entered into the agreements with?

"Defendant: Yes.

"Court: Did you in fact do so?

"Defendant: Yes.

Q. Now, you were asked those questions and did you make those answers on October 18, 1976?

A. Yes.

Q. Were you at that time telling the truth to the Court?

A. No.

Q. You were lying?

A. Yes.

Q. And the Court was Judge Costantino?

A. Yes.

Q. And you lied to Judge Costantino? A. Yes.

Mr. Green: I have nothing further, your Honor.

There was thus a clear impression left by appellant Thistlethwaite's counsel that DeMaio had lied to the District Court about perhaps his own as well as the other fourteen conspirators' involvement.⁴⁴ The impression that DeMaio was lying about the involvement of other people was reinforced in the jury's mind when appellant Alphonse Bifulco's counsel asked him:

Q. . . . Isn't it a fact that the more people that you can lie about and get involved to the prosecution and to trial to which you yourself are not even facing would help yourself?

A. This is all the truth I am saying. (631-632).

It was thus to correct the entirely misleading impression that DeMaio had lied about the involvement of others in his indictment, and by implication that he was lying about the involvement of the appellants in the instant case, that the Assistant United States Attorney asked DeMaio if he knew what happened to Joseph Mazzio,

⁴⁴ DeMaio later explained that when he said that he had lied, he meant that he had not named everyone, including appellants here, who were involved in angel dust sales and manufacture (638).

one of DeMaio's co-defendants (676). The question was objected to, and the Assistant United States Attorney asked for a side bar to state his reasons for asking the question. In relevant part the discussion proceeded as follows:

MR. WEINBACH: ... He (DeMaio), is going to testify concerning what happened with each of these individuals [named in the indictment].

THE COURT: As to what sentence they received

MR. WEINBACH: No, sir, if they pleaded guilty or not and whether or not these people knew any of the defendants [then on trial, i.e. appellants] and how they knew them (677).

After an extended side-bar the questioning of DeMaio was resumed (687):

Q: Mr. DeMaio, Joseph Mazzio was indicted with you?

A: Yes.

Q: Do you know what happened with his case?

A: Yes.

Q: What?

A: He got fined \$2000 and five years probation.

Q: He pleaded guilty?

A: Yes.

At this point, appellant's counsel moved for a mistrial and the District Court excused the jury (688). A fifteen minute recess was then taken, and the Judge recalled the jury and told them that it was not their obligation to determine the punishment of anyone, that their sole

function was to determine the guilt or innocence of the persons charged (701-702).

We simply do not understand Thistlethwaite's claim that he was prejudiced by the fact that DeMaio revealed that a conspirator in an unrelated case, not tied to any of the appellants, pleaded guilty and was given a particular sentence. Particularly in light of the fact that Thistlethwaite's counsel had already elicited from DeMaio that two fellow angel dust cohorts had died (487), we do not understand how the fact that someone received probation and a fine could be more prejudicial to Thistlethwaite than the implication, which Thistlethwaite tried to raise to discredit DeMaio, that young people may die when they become involved in angel dust transactions.

CONCLUSION

The judgments of conviction against Alphonse Bifulco, Michael Thistlethwaite, and John McFarland should be affirmed.

Dated: Brooklyn, New York
December 2, 1977

Respectfully submitted,

DAVID G. TRAGER
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ELIA WEINBACH,
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Assistant United States Attorneys,
(Of Counsel).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

ELIA WEINBACH

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 5th day of December 1977 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to
THOMAS MCGANNEY, 14 WALL STREET, NEW YORK, NEW YO. 5
MARTIN ERDMAN, ESQ., 509 U.S. COURTHOUSE, FOLEY SQ., N.Y., N.Y. 10007
ROBERT E. GREEN, ESQ., 118-21 QUEENS BLVD., FOREST HILLS, N.Y. 11375

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Elia Weinbach

Sworn to before me this

5th day of December 1977
Barbara Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24464824
Qualified in Kings County
Commission Expires March 30, 1979